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AUTHORITIES CITED.

CASES.

MISCELLANEOUS.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

J. W. BAILEY, COLLECTOR of INTERNAL Revenue, et al., Appellants,
v.
JOHN G. GEORGE, TRADING AND DOING business as Vivian Cotton Mills, et al. — No. 590.

J. W. BAILEY, AND J. W. BAILEY, Collector of Internal Revenue for the District of North Carolina, Plaintiff in Error,
v.
DREXEL FURNITURE COMPANY. — No. 657.

APPEAL FROM AND WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF ON BEHALF OF APPELLANTS AND PLAINTIFF IN ERROR.

In each of these cases the same District Court has declared unconstitutional the excise tax imposed by Congress upon those employing child labor in mines, quarries, factories, and similar employments.

THE STATUTE.

The tax was imposed by section 1200 of the revenue act of 1918, approved February 24, 1919, 40 Stat., c. 18, p. 1138, which provides as follows:

> That every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (*a*) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (*b*) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment.

Succeeding sections provide the basis upon which net profits are to be calculated and contain provisions the effect of which is that the mere accidental

employment of children under the permitted age shall not make the employer liable for the tax if he has in good faith taken the required precautions to prevent such employment.

THE FACTS IN THE VIVIAN COTTON MILLS CASE.

This suit was instituted on July 7, 1921, to enjoin the collection of a tax assessed under the law in question, the contention being that the statute is unconstitutional.

The bill, as amended, alleges that the plaintiff, John George, during the year 1919 manufactured cotton yarns at Cherryville, N. C., under the name of "Vivian Cotton Mills." The property and business had passed to the other plaintiff, the Vivian Spinning Company, before the institution of this suit.

The defendants are the Collector and the Deputy Collector of Internal Revenue for North Carolina.

On November 9, 1920, the Commissioner of Internal Revenue, acting under the provisions of the Child Labor Tax Law, assessed against the plaintiff George and his property, the Vivian Spinning Company, the sum of $2,098.06, due November 19, 1920, with a penalty of 5 per cent and interest at the rate of 1 per cent per month from the date due until paid, the Commissioner claiming that during the taxable year 1919 there had been employed in the Vivian Cotton Mills children under the age of fourteen and children between fourteen and sixteen years of age more than eight hours a day, after 7 p. m. and before 6 a. m., contrary to the statute.

The plaintiffs deny violation of the Act, and aver that the Commissioner advised them to file a claim for abatement of the tax, which claim was duly filed and disallowed, and the Collector was instructed to collect the tax by distraint proceedings. They further allege that, unless restrained, the Collector will sell plaintiffs' property, subjecting plaintiffs to a loss of approximately $50,000, in view of the low state of the market for cotton mills, cotton mill stocks, and cotton mill products, and to other great and irreparable damage.

The bill prays that the assessment be declared void and that defendants be enjoined from selling plaintiffs' property, it being alleged in the bill, as amended, that the statute is unconstitutional, (1) as depriving plaintiffs of their property without due process of law, in violation of the Fifth Amendment; (2) as denying to them the right to trial by jury, which is guaranteed to them by the Seventh Amendment; (3) as providing for the exercise of a power not delegated to the United States, but reserved to the States and to the people under the Tenth Amendment; and (4) as not constituting a tax measure but an attempted regulation of hours of labor and age of employees, under which a penalty is imposed and enforcement is proposed without giving the petitioners an opportunity to be heard, although they deny liability.

A temporary restraining order was issued as prayed. Thereafter defendants filed an answer to the bill.

The good faith of the revenue authorities in assessing the tax is shown by the averment in the answer that the plaintiffs had filed with the Collector a report that during the taxable year 1919 they had employed children within the ages referred to in the statute. This good faith exists even though the plaintiffs assert that if a report of such employment was made the report was erroneous.

The defendants also moved to dismiss the case for want of jurisdiction, on the ground that the court was forbidden by Revised Statutes, section 3224, to entertain a suit to restrain the collection of a tax.

The District Judge denied the motion to dismiss and made permanent the temporary restraining order. The court held that the Child Labor Tax Law was unconstitutional, as constituting an attempt on the part of Congress, not to collect revenue, but to control the internal affairs of the States.

It further held that a suit to prevent the collection of this tax, which was held unconstitutional, might be maintained, since to permit its collection would be to extend the power of Congress, through taxation, to legislation forbidden by the Constitution, especially the Ninth and Tenth Amendments. It also ruled that the statute provided not for a tax but for a penalty to prevent violation of its provisions, which penalty could not be enforced by assessment and distraint, and that therefore a permanent injunction should be granted.

The defendants were allowed a direct appeal to this court.

THE FACTS IN THE DREXEL FURNITURE COMPANY CASE.

This is a suit to recover a tax of $6,312.79, with interest, levied under the Child Labor Tax Law and paid under protest on October 20, 1921, it being asserted that that statute is unconstitutional.

The plaintiff, the Drexel Furniture Company, is a North Carolina corporation engaged in the manufacture of furniture. It is suing J. W. Bailey personally and as Collector of Internal Revenue for the District of North Carolina. He was Collector as aforesaid when the tax was paid. After that date, but before the institution of this suit, he resigned from his position and was succeeded by one Grissom.

Prior to September 20, 1921, plaintiff was informed that during the year 1919 it had employed in its business children under the age of fourteen. It thereupon presented to the Commissioner of Internal Revenue a claim for abatement of the assessment that it was proposed to make because of such employment. This claim was denied, for the reason that, upon investigation, it was found that during the taxable year 1919 plaintiff had employed and permitted to work in its factory a child under fourteen years of age.

On September 20, 1921, plaintiff received from the defendant, as Collector, notice of an assessment of $6,312.79, which was a tax of ten per cent on its net profits for the year 1919, together with a statement that if said tax was not paid on or before October 20, 1921, the penalty provided by the Child Labor Tax Act would be imposed.

In order to avoid said penalty and to prevent summary proceedings for the collection of the tax, the plaintiff paid the tax under protest. Thereafter the plaintiff filed a claim for refund, which was denied by the Commissioner of Internal Revenue on or about October 25, 1921.

Plaintiff prays for the recovery of the tax, together with interest thereon at six per cent from the date of payment, upon the ground that the taxing statute is unconstitutional because—

(1) It is not the laying or collecting of a tax duty, impost, or excise to pay the debts and provide for the common defense and general welfare of the United States as authorized by section 8 of Article 1 of the Constitution.

(2) It is not the laying or collecting of taxes on income which, by the Sixteenth Amendment, Congress has power to lay and collect without apportionment among the several States and without regard to any census or enumeration.

(3) It is within none of the powers delegated to Congress by the Constitution or any of its Amendments.

(4) The sole and intended effect of said statute is to prohibit the employment of child labor in manufacturing within the State, and is thus an attempt to control the conditions and methods of manufacture, and therefore is an attempted usurpation of the rights and powers of the various States.

(5) Its enactment by Congress is an attempted usurpation of the powers reserved to the States respectively or to the people, and is

therefore in violation of the Tenth Amendment.

(6) Its enforcement would deprive plaintiff of its property without due process of law, in violation of the Fifth Amendment.

The defendant demurred to the complaint; but the demurrer was overruled and judgment entered for the plaintiff for the amount claimed, the court holding that the statute was unconstitutional as effecting a regulation of a "purely internal affair of the States." This direct writ of error was then sued out.

ARGUMENT.

I.

The Jurisdiction of the Lower Court.

In the first of the two cases, the lower court was without jurisdiction. In the second case jurisdiction is not disputed.

In the first case (*Bailey* v. *George*) a bill was filed to restrain the Collector of Internal Revenue from collecting the tax.

Section 3224 of the Revised Statutes expressly provides:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The claimed invalidity of a tax has never been held by this court to remove the bar of the statute.

In the leading case of *Snyder* v. *Marks*, 109 U. S. 189, which was a suit to enjoin the collection of a revenue tax on tobacco, it was contended that the tax had been illegally assessed. This court nevertheless held that section 3224 barred the action. After reciting the history of the section and noting that the word "tax" as used therein comprehends an *illegal* as well as a legal tax (p. 192), the court said (pp. 193, 194):

> The inhibition of sec. 3224 applies to all assessments of taxes, *made under color of their*

> *offices*, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. * * * In *Cheatham* v. *United States*, 92 U. S. 85, 88, and again in *State Railroad Tax Cases*, 92 U. S. 575, 613, it was said by this court that the system prescribed by the United States in regard to both customs duties and internal revenue taxes of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by sec. 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed when those officers in the course of general jurisdiction over the subject matter in question have made the assignment [assessment] and claim that it is valid.

In *Dodge* v. *Osborn*, 240 U. S. 118, the appellant sued to enjoin the collection of taxes imposed under the income tax section of the tariff act of October 3, 1913, on the ground that the taxing statute was unconstitutional. This court, affirming the decree

below dismissing appellant's bill, held section 3224 applicable. After quoting with approval the language of the court in *Snyder* v. *Marks*, as set forth above, the court said (p. 121):

> This doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax *because of the alleged unconstitutionality* of the statute imposing it. *Shelton* v. *Platt*, 139 U. S. 591; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Board of Public Works*, 172 U. S. 32; *Pacific Steam Whaling Co.* v. *United States*, 187 U. S. 447, 451, 452.

This section has been said by this court to have grown out of the "sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the Government depends for its continued existence." (*State Railroad Tax Cases*, 92 U. S. 575, 613.)

It is true that in *Dodge* v. *Osborn*, *supra*, the court assumed solely for the sake of argument that under some exceptional circumstances suits to enjoin the collection of a tax might be brought, but it added (p. 122) that—

> It is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable.

In the Vivian Cotton Mills case the tax was entirely prospective (sec. 1207 of Child Labor Tax Law) and to be paid out of profits. The manufacturer

should have made allowance for this tax before distributing the profits. Indeed, there is no allegation that the entire profits were distributed or that the manufacturer is not able to pay the entire tax from funds in bank. The only allegation is that if the tax is not paid, and the Government resorts to distraint proceedings, some of the manufacturer's property may be sold for an abnormally low return. Certainly the plaintiff has not shown such exceptional circumstances as would warrant the interposition of the court, even if, in spite of the express provision of section 3224 of the Revised Statutes, the court might under some "extraordinary and entirely exceptional circumstance" interpose to prevent the collection of a tax.

The District Court was of opinion that Revised Statutes, section 3224, had no application, because the tax in dispute was not in truth a tax, but a punitive penalty.

Where, on the face of the statute, a tax is nominally imposed, its validity as a tax can not be determined on a bill in equity to enjoin the collector. It does not matter whether the tax is constitutional or unconstitutional. It is still the policy of the law that the question must be determined by a suit for a refund.

Apart from this, can it be questioned that this is a tax? Congress has thus described it, and whether constitutional or otherwise by reason of its incidences, it is nevertheless an excise tax.

It may not be easy to draw a line of demarcation between a punitive penalty and a tax; but the line

of demarcation seems to be that, where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the act, then it is a punitive penalty, and not a tax at all; but, where the thing done is not prohibited, but, with respect to the privilege of doing it, an excise tax is imposed, it is none the less a tax, even though it be, in its practical results, prohibitive. An import tax which absolutely prohibits the importation of a given commodity could not be said to be a punitive penalty, even though it operates to prohibit the importation as effectually as though it were a section of the criminal law prohibiting the importation under any circumstances. In the instant cases, the statute does not pretend to prohibit and does not in fact prohibit the employment of child labor. If a manufacturer desires to employ such labor, he is free to do so; but, if he does so, he must pay an excise tax for the privilege. Where the excise tax is prohibitive in amount, there may be little practical difference between such an excise tax and a penal prohibition; but, theoretically, they are different exercises of governmental power.

II.

The Doctrine of This Court as to the Constitutionality of the Law.

In the Drexel Furniture Co. case the jurisdiction of the lower court does not seem to be open to objection and this court is asked to determine the validity, under the Constitution, of the Child Labor Tax Law, and this, in turn, involves the question as to the extent, if any, to which this court may consider the motives which induced Congress, in the exercise of its power to tax, to select subjects for taxation.

This question is important, but not novel. If it can be regarded as still open to question, in view of the repeated and consistent decisions of this court from *Veazie Bank* v. *Fenno*, 8 Wall. 533, decided in 1869, down to *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, decided in 1921, then the question is of vast importance as a constitutional problem, for it confronts this court with a very serious dilemma.

If, on the one hand, it should hold that the exercise of an undoubted power of the Federal Government to impose an excise tax can be nullified by attributing to the framers of the law a purpose or motive to secure an ulterior end not sanctioned by the Constitution, then an intolerable burden may be put upon this court to determine as to future laws the purpose which Congress may have had in their enactment.

The great and solemn duty of adjudging invalid any enactment of Congress, which is in contravention to the Constitution, has already imposed a very heavy burden upon this great tribunal. It is obvious that if this court were now to assume the added burden of declaring a law unconstitutional, not because of that which it directly provides, but because of some inferable unconstitutional motive, which may have influenced Congress in its enactment, the work of this court would be more delicate than ever.

This is true; but candor requires me to add that it may also be true that if, in our complex civilization, when steam and electricity have intricately unified the relations of life, the powers of the Federal Government can be utilized to secure objectives which are beyond the scope of Federal power, then our constitutional form of Government may prove to be a less effective distribution of powers than is generally believed.

The repeated decisions of this court for the last half century indicate that the former view is the correct one. The contrary view is generally supported by the famous dictum of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 416. Let me quote, in parallel columns, this earlier and a later expression of this court.

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Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, at p. 423.

Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, *and is really calculated to effect any of the objects intrusted to the Government*, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. *This court disclaims all pretensions to such a power.*

Chief Justice White in McCray v. United States, 195 U. S. 27, at pp. 55, 56.

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the Government, *where a wrong motive or purpose has impelled to the exertion of the power*, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. * * * *The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.*

Between these two statements, there is no necessary inconsistency; for it is to be observed that the latter portion of the extract from the opinion of Chief Justice Marshall above quoted does much to weaken the force of the preceding sentence. As applied to the instant case, the validity of the Child

Labor Tax Law can be sustained without violation to that which Chief Justice Marshall so forcefully said, for it is not contended that the Constitution prohibits an excise tax upon manufacturers, and, to the extent that manufacturers employ child labor, it would yield revenue to the Government and thus effect a governmental purpose.

Moreover, the extract from the opinion in *McCulloch* v. *Maryland*, above quoted, was merely *dictum* on the part of Chief Justice Marshall, for in that case he was not considering the effect of an act of Congress, but of an act of a State legislature, and the precise question now presented was not before him. The question in issue in *McCulloch* v. *Maryland* was whether the Constitution, by necessary implication, forbade a State to tax the agencies of the Federal Government.

It should be further noted that, in the later case of *Brown* v. *Maryland*, 12 Wheat. 419, 439, decided in 1827, the same Chief Justice also said:

> It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend upon the degree to which it may be exercised. *If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.*

Before applying the doctrine of these cases to the instant cases, it seems desirable to fix clearly the premises upon which this court will rest its judgment, and this may be done catechetically as follows:

Q. Has the Federal Government the power to impose an excise tax?

A. It certainly has.

Q. Does the statute in question impose an excise tax?

A. It certainly does; for it provides that manufacturers of a certain class "shall pay for each taxable year in addition to all other taxes imposed by law an excise tax equivalent to 10 per cent of the entire net profits," etc.

Q. Is this a tax in fact as well as in form?

A. It certainly is, and the instant cases prove it; for, in the first case, a suit is brought to restrain a Government official from collecting the tax, and, in the second case, the plaintiff below sues to recover a tax assessed under the statute and already paid into the Treasury of the United States.

Q. What, then, in the last analysis, is the question?

A. It is this: If the Congress imposes an excise tax, can it be invalidated on the *assumption* that the real motive of Congress was not to collect revenue but to regulate child labor?

Assuming that Congress was actuated by the motive thus imputed to it, does the case fall within the doctrine as announced by Chief Justice Marshall, and above quoted?

I think not. Such an excise law is not expressly prohibited, and as it does raise revenue, if a manufacturer exercises his undoubted right to employ child labor, it, in the language of Chief Justice

Marshall, "is really calculated to effect any [one] of the objects intrusted to the Government."

Certainly such a case falls expressly within the doctrine, as announced by Chief Justice White, and above quoted, that this court will not "restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be executed."

In considering the effect of motive or objective upon the exercise of delegated power, care must be taken to distinguish between the power of this court to invalidate a State statute when it invades the province of the Federal Government and the power of this court to nullify a law passed by Congress, a coordinate branch of the Government. Chief Justice Marshall, in the same case of *McCulloch* v. *Maryland*, 4 Wheat. 416, 435, clearly drew attention to the distinction between them:

> It has also been insisted that, as the power of taxation in the General and State Governments is acknowledged to be concurrent, every argument which would sustain the right of the General Government to tax banks chartered by the States will equally sustain the right of the States to tax banks chartered by the General Government.
>
> But the two cases are not on the same reason. The people of all the States have created the General Government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their

> representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the Government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a Government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a Government declared to be supreme and those of a government which, when in opposition to those laws, is not supreme.

Chief Justice White dwelt further on this distinction in *McCray* v. *United States* (195 U. S. 60). The late Chief Justice fully conceded that when a State adopts a law, the necessary effect of which is to exercise a power granted by the Constitution to the Government of the United States, it must follow that the act is void. But he pointed out that this is due to the paramount nature of the Constitution of the United States. Under Article VI, where there is any conflict between State and Federal activity the Federal Government is supreme. Where, however, Congress in exerting its power to levy taxes deals with a subject, which might also be regulated by the police power of the State, the Federal statute is not nullified by any power which the State might otherwise possess.

Before citing the many authorities in which this court has disclaimed any power to sit in judgment upon the motives with which Congress exercises its delegated powers, let me say that I do not concede that no fiscal reason can be assigned, which justifies the Child Labor Law as a revenue measure. It is notorious that child labor is cheap labor, and this being so, Congress may have considered this privilege of cheaper production as a fiscal reason for the tax.

However, I do not stress this point, for I prefer to add, in the spirit of candor, that if this court is empowered to consider the *motive* of Congress, then the contention that the *dominant* motive of Congress in passing this Statute was to make the employment of child labor expensive by reason of added taxation is not unreasonable.

If so, it is not the first time in the history of taxation that taxes have been imposed for other than fiscal purposes. The question is, not what the motive of Congress is, but does this statute impose an excise tax; and, if so, whether the imposition of such a tax has been forbidden by the Constitution.

Certainly by no *express* prohibition, and it remains to inquire whether it is by an *implied* prohibition.

The doctrine of implied *powers* is a natural and necessary one; but the doctrine of implied *limitations* is one, for which there is little countenance in either the text of the Constitution or its judicial interpretation.

Few, if any, implied limitations upon expressly delegated powers have ever had the sanction of this

court. The greatest of all was that, which was recognized in *McCulloch* v. *Maryland*, and, so far as my knowledge goes, it is the only implied limitation upon the taxing power, and it was decided from an obvious and imperative necessity, for, neither the Federal Government nor the constituent States could possibly continue to exist if either had the power to tax the agencies of the other out of existence.

With this exception, however, this court has said repeatedly that the power to tax is only restricted by the *express* prohibitions of the Constitution, and none can be implied where, as in the instant case, they depend upon a question of fact, viz, the motive for the exercise of the delegated power.

In *In re Kollock* (165 U. S. 526), this court, speaking through Chief Justice Fuller, said:

> The act before us is *on its face* an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, *its primary object must be assumed to be the raising of revenue.* (165 U. S. 536.)

Again, in *McCray* v. *United States* (195 U. S. 27, 50), this court, in one of the late Chief Justice's most powerful opinions, said "that the acts in question on their face impose excise taxes which Congress had the power to levy is so completely established as to require only statement." In that case Chief Justice White, anticipating the argument in the instant case, very forcefully said (195 U. S. 54–59):

It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the Government may exert its lawful powers *with the object or motive of reaching an end not justified*, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. *But this reduces itself to the contention that, under our constitutional system, the abuse by one department of Government of its lawful powers is to be corrected by the abuse of its powers by another department.*

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the Government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions.

And again:

It is of course true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another

> department of the Government where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies not in the abuse by the judicial authority of its functions but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power.

And again:

> The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said, from the beginning no case can be found announcing such a doctrine, and on the contrary the doctrine of a number of cases is inconsistent with its existence. As quite recently pointed out by this court in *Knowlton* v. *Moore* (178 U. S. 41, 60), the often-quoted statement of Chief Justice Marshall in *McCulloch* v. *Maryland*, that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power *because of the destructive effect of the exertion of the authority.*

The Chief Justice then proceeds to quote with approval the following utterances of this Court, which we requote as follows:

In the License Tax Cases (5 Wall. 462) this Court said:

> It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, *and thus only*, it reaches every subject, and may be exercised at discretion.

In *Pacific Insurance Co.* v. *Soule* (7 Wall. 433), referring to the unlimited nature of the power of taxation conferred upon Congress, the court observed (p. 443):

> Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government.

And after referring to the express limitations as to uniformity and articles exported from any State, the court remarked (p. 446):

> With these exceptions, the exercise of the power is, in all respects, *unfettered*.

In *Austin* v. *The Aldermen* (7 Wall. 694) the court again declared (p. 699) that

> The right of taxation, where it exists, is necessarily *unlimited* in its nature. It carries with it inherently the power to embarrass and destroy.

In the leading case above referred to (*Veazie Bank* v. *Fenno*, 8 Wall. 533), where a tax levied by Congress on the circulating notes of State banks was assailed on the ground that the tax was intended to destroy the circulation of such notes, and was, besides, the exercise of a power to tax a subject not conferred upon Congress, the court said, as to the first contention (p. 548):

> It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.
>
> The first answer to this is that the judicial can not prescribe to the legislative department of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it can not, for that reason only, be pronounced contrary to the Constitution.

In *Knowlton* v. *Moore* (178 U. S. 41) the cases referred to above were approvingly cited, and the doctrine which they expressed was restated.

In *Treat* v. *White* (181 U. S. 264), referring to a stamp duty levied by Congress, the court observed (p. 269):

> The power of Congress in this direction is *unlimited*. It does not come within the

> province of this court to consider why agreements to sell shall be subject to the stamp duty and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other.

In *Patton* v. *Brady* (184 U. S. 608), considering another stamp duty levied by Congress, the court again said (p. 623):

> It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed.

In *McCray* v. *United States* (195 U. S. 59; see also 60–62) Chief Justice White answered the contention that, because the effect of the tax then considered might be to destroy or restrict the manufacture of the article taxed, the power to levy the tax did not exist. This, he said—

> is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.
>
> Since, as pointed out in all the decisions referred to, *the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.*

In the more recent case of *Flint* v. *Stone Tracy Co.* (220 U. S. 107, 153, 154), the court said, by Mr. Justice Day:

> The Constitution imposes only two limitations on the right of Congress to levy excise taxes; they must be levied for the public welfare and are required to be uniform throughout the United States. * * * The limitations to which [Chief Justice Chase, in the *License Tax Cases, supra*] refers were the only ones imposed in the Constitution upon the taxing power. * * * The limitation of uniformity was deemed sufficient by those who framed and adopted the Constitution. The courts may not add others.

And in *United States* v. *Doremus* (249 U. S. 86, 94), again speaking by Mr. Justice Day, the court said:

> The only limitation upon the power of Congress to levy taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared that it can not add others. Subject to such limitation Congress may select the subjects of taxations and may exercise the power conferred at its discretion. * * * Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State.

The case of *Hammer* v. *Dagenhart* (247 U. S. 251) does not overrule this long-accepted doctrine.

In that case a statute was passed, as a regulation of commerce, which forbade the transportation in such

commerce of goods made at a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen had been employed or children between the ages of fourteen and sixteen had been worked more than eight hours in a day.

In that case it was plausibly contended that the real purpose of Congress was not so much to regulate the transportation of commodities as to regulate the method of their production—a matter which concededly is within the exclusive power of the States. Nevertheless, on its face, the statute did provide that given commodities to which child labor presumptively contributed could not be carried in interstate commerce.

The question presented itself whether such a prohibition of the right of transportation could be justified when its apparent purpose was to restrain the producers of the commodities thus transported from employing child labor.

Distinguishing the lottery statute, the pure food and drugs act, the white slave traffic act, the Reed Act, in all of which cases the power to regulate commerce was utilized to accomplish moral ends concededly within the police powers of the States, this court held that in these instances "the use of interstate transportation was necessary to the accomplishment of harmful results," and therefore because of the intimate connection between the sale of such harmful commodities and the transportation thereof these statutes were sustained. This court then proceeded to say (p. 271):

> This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. *The act in its effect does not regulate transportation among the States*, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. * * * When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power.

The decision was rested upon the ground of want of power and not upon motive in exercising a power. This conclusion was reached by a nearly evenly divided court, four Justices concurring in Mr. Justice Day's opinion and four dissenting.

It can not be questioned, and should be freely conceded, that, as a result of this decision, Congress enacted the present law, by which the same end was sought to be accomplished through the greater power of taxation. The substantial difference between the two statutes is that in the former case the prohibition of child labor was sought to be secured by denying to the employers the privileges of interstate traffic, while in the present case the same end is sought by imposing upon the employer a tax in ex-

cess of that imposed upon like manufacturers, who do not employ child labor.

In the former case there was a complete denial of the vital right of interstate transportation, without which many manufacturers could not continue to employ child labor, to products which may never have been manufactured by such labor, while in the instant case an excise tax is imposed upon the employer of child labor. In the former case no reasonable relation was found between interstate transportation and child labor, while a relation always exists between a tax and the subject matter thereof.

It has always been recognized that the right to tax is exceptional in the sweep of its power because of its vital connection with the right of the Government to exist, and because, while the Federal commercial power only relates to interstate and foreign commerce, the taxing power comprehends all taxable objects, whether interstate or intrastate.

III.

Inevitable Incidences of Laws.

In considering this question of invalidating the exercise of a delegated power by reason of its assumed motives or objectives, a distinction should be made between the following classes of cases:

1. Where the exercise of a Federal power has an unquestioned but incidental effect upon some right reserved to the States.

In this case obviously the Federal statute can not be invalidated. Even in the relatively primitive con-

ditions, under which the Constitution was framed, it was inevitable that the exercise of Federal powers would react upon State rights as the exercise of State rights would react upon Federal powers. To-day, when the equilibrium between these two systems of government has been greatly disturbed by the centripetal influences of economic forces, few laws could be passed, either by State or Nation, that would not have such a reflex action. State and Federal powers do not run in parallel lines, which never meet. They run in interlacing zig-zags.

2. Instances where it is clear that Congress in passing a Federal statute not only has a legitimate Federal purpose but may also have been actuated by some motive beyond the province of the Federal Government.

In this case, there is also no power to invalidate a Federal statute. This court could not, even if it would, weigh different motives. It is enough that the statute is an exercise of power for a lawful purpose. That there may have been other and ulterior motives or purposes can not affect the validity of the legislation.

3. Cases where, from the history of the legislation, there is reason to believe that the power was exercised, not to accomplish some purpose intrusted to the Federal Government by the Constitution, but wholly to accomplish by indirect action some purpose which was not within its scope.

Here, too, this court can not invalidate a statute, because, however plausible the inference may be in a given case of an ulterior and unconstitutional motive, it can not judge the motive and object of Congress, either by declarations in debate or even by the history of the legislation. The good faith of Congress in passing the law must be assumed.

4. Cases in which this court can indubitably deduce *from the language of the act* that the exercise of the power was not to accomplish *any* purpose intrusted to the Federal Government, but rather some purpose beyond the scope of Federal power.

Here, if in any case, this court may nullify the law. Such a case was *Hammer* v. *Dagenhart*, *supra*.

Can such a case arise in a taxing statute? Can it be safely adjudged that Congress did not intend to impose a tax, when it expressly says that it does? In *McCray* v. *United States*, *supra*, this court answered this question in the negative.

In the instant case it may be that Congress intended incidentally to regulate child labor by the exercise of its taxing power, but this is one of the cases where Congress, having lawfully chosen the subjects for taxation, its exercise of an undoubted power cannot be challenged, because such tax may have an incidental effect upon some reserved rights of the States. If this were not so, many Federal taxes would be assailed, because it has always been true that in levying taxes Congress has taken into consideration matters

that are beyond the scope of the Federal Government. Before the Revolution the regulations of the Lords in Trade and the impost duties imposed by the Lords in Trade were always used, not for fiscal purposes but as means of regulating commerce.

Following this method of regulating commerce, import duties, and at times internal taxes, have been levied from the beginning in order to accomplish ends, sometimes moral and sometimes economic, which were in themselves not within the scope of Federal power.

Thus when liquor was a permissible commodity it was always recognized that to impose heavy excise taxes upon its sale accomplished a moral purpose, and yet, until the Eighteenth Amendment, the morality of drinking was not a question with which the Federal Government had any concern. But no one ever questioned that a tax which imposed a restrictive influence upon the sale of liquor, and was intended to do so, was none the less a valid tax because of an ulterior moral purpose.

So also, in the leading case of *McCray* v. *United States* (195 U. S. 27), where it may well be supposed that Congress had sought to attain an economic end by means of a taxing statute, this court refused to declare the legislation unconstitutional.[1]

[1] Well-known examples of the use of the taxing power in connection with social or economic ends are the protective tariff system; the tax on foreign-built yachts: *Billings* v. *United States* (232 U. S. 261); on notes of State banks: *Veazie Bank* v. *Fenno* (8 Wall. 533); on importation of alien passengers: *Head Money Cases* (112 U. S. 580); graduation

Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State. The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress, that is sufficient to sustain it. (*United States* v. *Doremus*, 249 U. S. 86, 93, 94.)

Reverting to the *License Tax Cases*, *supra*, it is clear that they are analogous to the instant cases. The court there conceded that "Congress has no power of regulation *nor any direct control*" over the domestic trade of a State. "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature." (5 Wall. 470, 471.) But the court nevertheless decided unanimously that Congress had power to impose an excise tax upon the sale of liquor wherever the sale was permitted.

So also the question whether child labor may be employed or not is a matter for the determination of

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of taxes: *Magoun* v. *Bank* (170 U. S. 283); *Knowlton* v *Moore* (178 U. S. 41); *Brushaber* v. *United States* (240 U. S. 1) on oleomargarine: *In re Kollock* (165 U. S. 526); *McCray* v. *United States* (195 U. S. 27); on sugar refiners: *American Sugar Refining Co.* v. *Louisiana* (179 U. S. 89). Well-known uses of the power in connection with moral ends are taxes on dealers in liquors and lottery tickets: *License Tax Cases* (5 Wall. 462); on dealers in narcotic drugs: *United States* v. *Doremus* (249 U. S. 86).

the States. But the tax law in the instant cases does not regulate the internal affairs of the States any more than did the taxing statute which was sustained in the *License Tax Cases*. It does not prohibit child labor. It merely requires a manufacturer who employs child labor to pay a tax not imposed upon one who does not employ child labor. Certainly Congress may select the subjects of taxation.

As Mr. Justice Story pointed out in his Commentaries on the Constitution:

> *The power to lay taxes is not by the Constitution confined to purposes of revenue.* In point of fact, it has never been limited to such purposes by Congress; and all the great functionaries of the Government have constantly maintained the doctrine that it was not constitutionally so limited. (Sec. 973.)
>
> The language of the Constitution is, "Congress shall have power to lay and collect taxes, duties, imposts, and excises." If the clause had stopped here, and remained in this absolute form (as it was, in fact, when reported in the first draft in the Convention), there could not have been the slightest doubt on the subject. The absolute power to lay taxes includes the power in every form in which it may be used, and for every purpose to which the legislature may choose to apply it. This results from the very nature of such an unrestricted power. *A fortiori* it might be applied by Congress to purposes for which nations have been accustomed to apply it. Now, nothing is more clear, from the history of commercial nations, than the fact that the

taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles for the encouragement and protection of domestic products and industry; for the support of agriculture, commerce, and manufactures; for retaliation upon foreign monopolies and injurious restrictions; for mere purposes of State policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes as a bounty upon an infant manufacture or agricultural product; sometimes as a temporary restraint of trade; sometimes as a suppression of particular employments; sometimes as a prerogative power to destroy competition, and secure a monopoly to the Government. (Sec. 965.)

IV.

Implied Limitations.

It is true, as previously stated (*ante*, p. 22) that this court has consistently recognized, as a necessary implication of the Constitution, that the Federal powers can not be used to destroy the purely governmental agencies of the States. But this necessary limitation, without which our dual form of government could not continue, is limited to purely governmental agencies and can not be extended to the nongovernmental activities of the people of the States or even those of the States as political entities.

This is shown by *Veazie Bank* v. *Fenno*, 8 Wall. 533. The court there held that while the State of Maine could charter a banking corporation, yet that corporation was not a governmental instrumentality and its currency was held to be subject to a prohibitive Federal tax. Similarly, where railroad corporations chartered by Congress claimed immunity from State taxation, it was held that the mere fact that they were chartered by the Federal Government, and were an instrument of interstate commerce, did not save their property from taxation by the States. (Authorities cited in *Choctaw, O. & G. R. Co.* v. *Mackey*, decided by this court June 1, 1921, 41 Sup. Ct. 582, 583.)

The most striking illustration of this is the case of *South Carolina* v. *United States*, 199 U. S. 437, where the government of South Carolina made a monopoly of the sale of liquor and yet, although the agents of the State were its officials, their sales of liquor as such officials were held to be subject to Federal taxation. The powerfully reasoned opinion of Mr. Justice Brewer in this case, to the effect that when a State leaves its purely functional operations as a sovereign and engages in what is normally regarded as private business, it is not, as to such activities, exempt from a Federal tax, shows conclusively that the mere fact that a State has, among its powers, the right to determine the conditions of child labor can not affect the power of the Federal Government to impose an excise tax upon the employer for the privilege of doing business in that way.

This excise tax may be unreasonable, arbitrary, or oppressive, but, as the cases hereinbefore cited show, such considerations are within the discretion of Congress, and that body, representing in a peculiar way the popular will, has the exclusive right of determining the reasonableness of selecting one class for taxation and exempting another, with all the attendant consequences of such discrimination. If it uses its power tyrannically, the remedy can only be with the people who elect the members of Congress.

Nowhere has this been stated more emphatically than in the *Chinese Exclusion Case* (130 U. S. 581, 602, 603), where the court said by Mr. Justice Field:

> If the power mentioned is vested in Congress, any reflection upon its motives, or the motives of any of its members in exercising it, would be entirely uncalled for. *This court is not a censor of the morals of other departments of the Government;* it is not invested with any authority to pass judgment upon the motives of their conduct.

In the much more recent case of *Smith* v. *Kansas City Title & Trust Co.* (255 U. S. 180, 210), decided at the last term, this court said, by Mr. Justice Day:

> But, it is urged, the attempt to create these fiscal agencies, and to make these banks fiscal agents and public depositaries of the Government, is but a pretext. But nothing is better settled by the decisions of this court than that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives.

V.

Reasons for Doctrine.

Thus far I have argued the case on the authorities, but as cases of this class are arising with increasing frequency, it may be well to state again the reasons for the doctrine.

I believe that the scope of the judicial power, in the matter of invalidating legislation, has been somewhat obscured, because the question has not been fully considered in the light of the history of the times when the Constitution was drafted.

It is noticeable that, in *Marbury* v. *Madison*, Chief Justice Marshall makes no reference to the history of the Constitutional Convention and did not base his argument upon the teachings of history. This, indeed, is true of all his great opinions, and his example in reaching conclusions upon constitutional questions by reasoning exclusively from the text of the instrument has greatly influenced his successors in this great court.

All of Marshall's great opinions were written before the details of the Constitutional Convention became public property through publication in 1840 of Madison's Debates. Up to that time little was known as to the deliberations of the Constitutional Convention, and all that was known was little more than gossip and hearsay.

The fact remains, however, that a great historical document can not be considered fully except in the light of the history of the times from which it was

evolved. It was a wise saying of one of the great mediæval legal scholars that the Institutes and Digest of Justinian could not be understood without a knowledge of the history of the times; for "*jurisprudentia sine historia cæca est*," and as a very scholarly Chicago lawyer (John M. Zane, Esq.) recently added, "this is as true to-day as when Cujas lifted the discussion of Roman law above the dry reasoning of the Glossators."

Similarly, a Shakesperian scholar knows that as much light is thrown upon occasional obscure passages in the First Folio by the history of the times as is thrown by a mere reading of the text.

It is, I believe, a common error that, when the Convention of 1787 framed the Constitution, it not only vested a larger power in the judiciary to nullify as *ultra vires* an unconstitutional act, but that, in fact, it created the right which was, as is so commonly stated, a novel contribution to the science of jurisprudence. This, I believe, to be an error; for, in the two countries from which, institutionally, the United States derives its constitutional form of government, there was, prior to the Convention of 1787, a clear recognition of the power of the judiciary to pass upon the *ultra vires* character of a law.

In England the common law was thus stated by Lord Coke in 1610, in *Bonham's Case*, 8 Coke's Reports, 118:

> And it appears in our books that in many cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an act of Parliament is

> against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.

This doctrine had the approval of three succeeding Chief Justices—Hobart, Holt, and Popham—and was recognized as the law in Bacon's Abridgment, Comyn's Digest, and Viner's Abridgment. Blackstone gave it some recognition in the Commentaries. "Free John" Lilburne, in the time of the Long Parliament, successfully asserted the invalidity of a statute when it offended fundamental rights.

The constitutional struggle of the Parliament against the Parliament's misuse of its power of taxation was based on the same fundamental consideration.

In the Convention of 1787 three different attempts were made to give to the judiciary complete power of revision over the laws of the Nation and the States in conjunction with the executive. On June 6th this proposition, although supported eloquently by Wilson, Madison, Ellsworth, Mason, Gouverneur Morris, and others, was voted down by a vote of 8 States to 3. On June 21st it was again discussed at length, and this time it was voted down by a bare majority of the vote of one State. On August 15th Mr. Madison, who was the chief proponent of this power of the judiciary, again brought up the plan in a modified form, and this time it was voted down by a vote of 8 States to 3. So opposed were the Framers to an absolute re-

visory power by the courts, that members objected to the inclusion in the Judiciary Article of the words "under the Constitution" and that, when the Judiciary Article of the Constitution was finally passed, it was with the tacit understanding of all members that the power to be exercised by the Court was confined to cases of a "judiciary" character, and not to "extra-judicial" questions, or, as we would now say, political questions. (See Madison's Journal, August 27.)

On August 27, when the eleventh article of the draft Constitution was under consideration, and the above text was reached, the following proceedings took place as reported by Madison:

> Dr. Johnson moved to insert the words "*this Constitution and the*" before the word "laws." Mr. Madison doubted whether this was not going too far, to extend the jurisdiction of the court *generally to cases arising under the Constitution*, and whether it ought not to be *limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department.* The motion of Dr. Johnson was agreed to, *nem. con., it being generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature.*

The beginning of the section thus then read:

> *The jurisdiction of the Supreme Court* shall extend to all cases arising under this Constitution and the laws of the United States and treaties made or which shall be made under their authority.

In spite of the true construction of the amended text being generally supposed in the convention to mean that the jurisdiction of the Supreme Court, in cases arising under the Constitution, was extended to cases of a "judiciary" nature and not extended to all cases generally, whether judicial or extrajudicial, Madison was not satisfied. Not long after, while this section was still under consideration, he says:

> Mr. Madison and Mr. Gouverneur Morris moved to strike out the beginning of the third section, "The jurisdiction of the Supreme Court," and to insert the words, "judicial power," which was agreed to *nem. con.*

The section thus then read:

> *The judicial power* shall extend to all cases arising under, etc.

The Constitution itself now reads:

> The judicial power shall extend to all cases *in law and equity* arising under, etc.

Contemporaneously with this fight in the Constitutional Convention, there was witnessed in France, the other country from which we developed our institutions, the culmination of a struggle of centuries between the political branch of the Government and the Courts. The highest Court of France was known as the "Parlement." From it, our English constitutionalism derives the name of "Parliament;" but the Parlement of France was a judicial body, with legislative powers of revision, while in England, the Parliament is a legislative body, with some incidental judicial powers. The French courts con-

tended that no law had validity until the courts "registered" it. Thus arose a three-century struggle between the king and the courts. (See appendix for details.)

The sequel in both countries is interesting. In France, as a result of the Revolution, all power was vested in the people. The monarchy was abolished, the executive was stripped of power, and the judiciary became elective and was also stripped of its revisionary power over legislation. In England, the Coke doctrine of the revisory power of the judiciary gave place to the present doctrine of the legal omnipotence of Parliament.

In our Nation, as we have seen, the Constitutional Convention voted down any proposition that the judiciary should have an absolute revisionary power over the legislature, which as the representative of the people was regarded as the most direct organ of their will. Both France and the Framers of our Constitution accepted the doctrine of Montesquieu that wherever legislative and judicial powers are concentrated in any one body of men, only tyranny could result. Probably this belief inspired Jefferson in his great distrust of the Federal judiciary and his hatred toward Chief Justice Marshall, for Jefferson was profoundly influenced by the doctrines of the French philosophers, and especially by those of Montesquieu.

Our Constitution created a truer equilibrium of power than France had at that time. We denied to the judiciary the full power of revision over laws, and

thus stripped them of legislative functions. As interpreted, our Constitution provides that the judiciary has no power of revision whatever, except when a concrete case is presented between litigants, and if, in such a case, an *invincible, irreconcilable, and indubitable repugnancy* develops between a statute and the Constitution, the Court applies the Constitution, and thus virtually nullifies the statute. It does not otherwise invade the field of political discretion.

VI.

Political Discretion.

Under our dual form of government, it is inevitable that there should be conflicting incidences of laws. Thus in the most difficult of our problems—the problem of distributing the power over commerce between interstate and intrastate commerce—it is inevitable that all State commercial regulations have an incidental effect upon interstate commerce, and that all Federal trade regulations have an incidental effect upon intrastate commerce.

So, too, it is inevitable that, when the Federal Government exercises its comprehensive power to tax, the incidences of the tax must often affect subjects which are within the reserved rights of the States. An attempt to avert this is as futile as Mrs. Partington's attempt to sweep up the Atlantic Ocean with a mop and broom.

As a result, there are many laws—Federal and State—which are *politically anti-constitutional*, without being *juridically unconstitutional*.

This distinction may be imperfectly grasped by the general public. The impression is general—and I believe that it is a mischievous one—that the judiciary has an unlimited power to nullify a law if its incidental effect is in excess of the governmental sphere of the enacting body. Our whole constitutional jurisprudence, with respect to the dual power over commerce, shows that this is not the fact.

Moreover, there is a large field of political action, into which the judiciary may not enter. It is the sphere of action which may be described as that of political discretion. The motives and objectives of an exercise of a delegated power are always matters of political discretion.

A delegated power can undoubtedly be exercised for a purpose that is within the scope of the enacting body's functions; but its incidences may also be without it. This is as true of the executive as it is of the judicial, and it is true of the legislative. The executive, in the broad discretion that it exercises, may often exercise many powers for an unconstitutional purpose, or in a manner that is opposed to the theory of our Government.

The Executive—although not above the law—can not be subjected generally to the revisory power of the judiciary in many cases of political discretion, even when he is carrying out a challenged law. This was decided by this Court in a case brought in 1867 by a sovereign State (Mississippi) against the President of the United States, to enjoin him from enforcing the Reconstruction

laws, which he had himself vetoed as unconstitutional. (*Mississippi* v. *Johnson*, 4 Wall. 475.)

After a very elaborate argument, this Court, without determining the constitutionality of the Reconstruction laws, wisely held that it would be subversive of the Government for the judiciary to enjoin the President, even if he were embarked on an unconstitutional course of action. The remedy was not in the judiciary, but in Congress, where the House could impeach him and the Senate, as high court of impeachment, could remove him. If they would not act, the ultimate remedy was in the sovereign people.

The same is true of the judiciary. Its actions can not be challenged by imputing to it an ulterior unconstitutional motive. In the Dred Scott decision it was believed throughout the country that this court, in nullifying the Missouri Compromise, did so in order to settle, once for all, the question of slavery, and put it beyond the power of political agitation. If so, such action was anti-constitutional. Even had this been so, the Dred Scott decision remained as a law. If this Court considered a question of political expediency in nullifying a political act, which had been the law for many years, the only remedy was with the people. Lincoln recognized this in accepting the decision *as law* but protesting against it as a continuing *political principle*. The agitation against the Dred Scott decision was possibly the principal cause, next to slavery itself, in precipitating the greatest civil war in history.

If this be true of the Executive and the Judiciary, t is far more true of the Legislature; for the power that makes the laws is peculiarly the representative of the popular will. Undoubtedly if it passes a law, which the Constitution did not empower it to pass, the Supreme Court, in a concrete case between litigants, may nullify it as *ultra vires*. This is due to the absence of *any* power whatever to do the thing.

So delicate a power has been rarely exercised by this Court. In all the thousands of laws that Congress has passed, in the 133 years of our existence as a Nation, not more than thirty laws of Congress have ever been nullified.

It is true that at least a thousand laws of the States have been nullified; but, as previously shown (*ante*, p. 19), the two cases are not in analogy; for the power to nullify a State law arises from the supremacy of the Federal Government, within the scope of its power; but the power of one branch of the Federal Government to nullify a law which has been passed by that coordinate branch of the Government, which is authorized to make laws, does not present the problem of a superior and an inferior, but of a coordinate department of our dual form of Government.

VII.

The Field of Operation True Test.

Therefore the only question can be, when the validity of a law is under question:

Is such a law *in its field of operation* within the delegated power of Congress? The motives of Con-

gress and the incidences of the law are beyond judicial censorship.

In exercising such powers, there is, as with the Executive, an indefinite field of political discretion. Into that field the Judiciary is powerless to go without usurping the very revisionary power over legislation which the framers of the Constitution refused to give to it.

Undoubtedly Congress can pass many laws from motives which are hostile to the spirit, and even to the letter, of the Constitution and which are, therefore, politically anticonstitutional.

For example, if Congress passes a law with the real purpose to coerce the Executive into doing or leaving undone some act which the Executive is constitutionally free to do or leave undone, then the act is politically anticonstitutional. For example, the President has the power to nominate officers of the United States. Suppose that Congress refuses to pass any supply bills unless the President shall nominate designated officials as prescribed by Congress. The act would be plainly politically anticonstitutional. It is the duty of Congress to vote supplies to the Executive; for without such supplies the Government cannot continue. But there is a broad political discretion as to the time when, and the methods by which, the supplies will be granted, and if, in selecting such times and methods, it attempts to coerce the Executive, the Judiciary is impotent to interfere, and the only remedy for such recalcitrancy is with the people.

Congress may pass many laws within the scope of its powers, and yet the real motive or objective of the laws may be the accomplishment of a design which is equally in excess of its true functions and plainly an attempt, by indirection, to accomplish an unconstitutional end.

This is deplorable. It is anticonstitutional. It may be subversive of our form of government; but, here again, the only remedy is with the people.

If the Judiciary attempts to impugn the motives and objectives of a coordinate branch of the Government, whether it be Executive or Legislative, it attempts a futile and impossible task.

In the first place, the motives and objectives are, in nearly all cases, a matter of conjecture. To impute a wrongful motive, where there may be a rightful one, is an intolerable impeachment by one branch of the Government of the work of another. In the case of the Executive, the motive or objective may be in a single brain and may be gathered by his declarations; but in the case of the Legislature, the Judiciary is dealing with a hydra-headed body, and when Congress passes a law it is impossible to determine what motives influenced the various members of the Legislature, or even a majority thereof.

Apart from the futility of the inquiry, however plausible a conjecture may be, there remains a far graver consideration that, while the human mind is what it is, it is impossible to prevent officials, in discharging their duties, from taking into account motives and objectives of a political nature.

Since parliaments began, men who are entrusted with the duty of legislation have, in giving their assent or dissent, considered the incidences of the proposed law—whether social, economic, or moral. This is inevitable. The legislator would not be a statesman who did not take into account what such incidences would be.

This is peculiarly true of all taxing measures. They have rarely, if ever, been levied solely with reference to fiscal necessities. From time out of mind the body that imposed taxes has considered all the varying influences upon the public welfare that such a levy would incidentally entail, and frequently the social, economic, or moral effect of the tax is often a far more influential consideration with the legislature than the mere question of revenue.

As I have shown in other briefs, nothing was more obvious to the Founders of this Republic than the distinction between a tax which was used to regulate trade and a tax that was used to raise revenue. This was the very foundation of our struggle with the mother country. The leaders of the Colonists never disputed that, if Parliament passed a law to control trade—in many respects to prohibit trade altogether—whereby no revenue would result, that it was a constitutional exercise of power. Their real objection was to a tax whose real purpose was to raise revenue from the Colonies for the purposes of the Imperial Treasury; and it was to that kind of tax and that kind of laws that they applied

the maxim: "Taxation without representation is tyranny."

Applying these considerations to the instant case, I argue that, however plausible the conjecture, this Court is powerless to say judicially that the motive of Congress in levying the tax under consideration was not to impose a tax, but to regulate child labor; and I further argue that, even if it were, that the fact remains that if, in levying the tax upon manufacturers that employ child labor, it did so with a recognition that such a tax might result in no revenue at all, and virtually prohibit the employment of child labor, that such purpose, while it may be *politically anti-constitutional*, in the sense that it may indirectly and incidentally regulate a matter otherwise within the discretion of the States, yet it is not *juridically unconstitutional*, because it is an exercise of an undoubted power to impose a tax; and the motives and objectives of the tax are within that broad field of political discretion into which the judiciary is powerless to enter. To use Madison's phrase, it is an "extra-judicial" question and as such beyond the power of the court.

VIII.

Remedy is With The People.

I recognize that this doctrine, carried to its logical conclusion, could, if Congress should utilize *all* its great powers to accomplish ulterior ends, go far to subvert our form of government. To that possibility I can not be blind; but, nevertheless, the remedy is not with the judiciary, but with the people.

The belief that the judiciary is fully empowered to sit in judgment upon the motives or objectives of other branches of the Government is a mischievous one, in that it so lowers the sense of constitutional morality among the people that neither in the legislative branch of the Government nor among the people is there as strong a purpose as formerly to maintain their constitutional form of Government.

Let this Court clearly say that in this broad field of political discretion there is no revisory power in the Judiciary, and that the remedy must lie in the people, then, if there be any longer a sufficient sense of constitutional morality in this country, the people will themselves protect their Constitution.

The erroneous idea that this court is the sole guardian and protector of our constitutional form of government has inevitably led to an impairment, both with the people and with their representatives, of what may be called the constitutional conscience.

It is the common belief that groups of men can agitate for any kind of a law, without considering its constitutional aspects; for, if it be unconstitutional in substance or in motive, the Supreme Court will avert the evil of its enactment. This indifference to our form of government, which is now so widely prevalent, has its reflex action upon the representatives of the people, both in the legislatures of the States and of the Nation. When laws are discussed which go to the verge of constitutional power, the principal, and sometimes the only, discussion is that

of policy, while the effect of such legislation upon our constitutional form of government is given little attention. The prevalent disposition seems to be to ignore constitutional questions by shifting them to the Supreme Court, in the belief that that court will exercise the full powers of revision, which I have tried to show the Framers of the Constitution did not intend this court to have. The result may be an exaltation of this court, as a tribunal of extraordinary power; but, in the matter of constitutionalism, it inevitably leads to an impairment of the powers and duties of Congress and, above all, to the impairment of the popular conscience; for, in the last analysis, the Constitution will last in substance as long as the people believe in it and are willing to struggle for it.

No one recognized this better than the Father of his Country, to whom, above all men, the Constitution owes its existence. Writing to his friend and comrade in arms, Lafayette, on February 7, 1788, Washington, in speaking of the merits of the new Constitution, said:

> These powers are so distributed among the legislative, executive, and judicial branches into which the Government is arranged that it can never be in danger of degenerating into a monarchy, an oligarchy, or an aristocracy, or any other despotic or oppressive form, *so long as there shall remain any virtue in the body of the people.* I would not be understood, my dear Marquis, to speak of consequences which may be produced in the evolution of ages by corruption of morals, profligacy of manners,

> and listlessness for the preservation of the natural and inalienable rights of mankind, nor of the successful usurpations that may be established at such an unpropitious juncture upon the ruins of liberty, however providentially guarded and secured, as these are contingencies against which no human prudence can effectively provide.

In this connection, it may be questioned that, however beneficent constitutional limitations themselves are in restraining the possible tyranny of the majority, yet constitutional limitations do not, in one respect, tend toward the preservation of constitutional liberty, for they weaken the vigilance of the people in preserving such liberty. It may be questioned whether, in countries like England, where Parliament is omnipotent, there is not a keener sense to defeat legislation which offends the fundamental decencies of liberty than in this country, where the people place their dependence upon the constitutional limitations and their reliance upon the judiciary to enforce them. England and Canada have no constitutional limitations which forbid the taking of property without due process of law; and yet the constitutional conscience in both their legislatures is sufficiently keen to defeat any law which offends the great principles of Magna Charta.

In this country, however, confiscatory legislation is freely passed, without much consideration of its oppressive features, because of the belief that, in every case, the Supreme Court will come to the rescue.

All this means a lessened spirit among the people of that eternal vigilance which is said to be the "price of liberty." The results of this decay of what Grote called "constitutional morality" were never better stated than by de Tocqueville in his remarkably prophetic book:

> The species of oppression by which democratic nations are menaced is unlike anything which ever before existed in the world. * * * Above this race of men stands an immense and tutelary power, which takes upon itself alone to secure their gratifications and to watch over their fate. That power is absolute, minute, regular, provident, and mild. It would be like the authority of a parent, if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood. * * * After having thus successively taken each member of the community in its powerful grasp and fashioned them at will, the supreme power then extends its arm over the whole community. It covers the surface of society with a net work of small, complicated rules, minute and uniform, through which the most original minds and the most energetic characters can not penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting; such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies

> a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals, of which the government is the shepherd. (De Tocqueville, Democracy in America, Vol. II, pp. 332–333; "The World's Great Classics" Edition.)

Unless the people themselves awaken to the fact that they themselves must defend and preserve their own institutions, and not rely wholly upon this court as a tutelary guardian, then that situation will come to pass which Shakespeare, although not a jurist or statesman, but only a philosophic poet, so well stated in one of the least known of his plays:

> Force should be right; or, rather, right and wrong,
> (Between whose endless jar justice resides)
> Should lose their names, and so should justice too.
> Then every thing includes itself in power,
> Power into will, will into appetite;
> And appetite, an universal wolf,
> So doubly seconded with will and power,
> Must make perforce an universal prey,
> And last eat up himself.
>
> (Troilus and Cressida, Act I, scene 3.)

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APPENDIX.

THE STRUGGLE IN FRANCE BETWEEN THE LEGISLATIVE AND THE JUDICIAL POWER.

In the reign of Louis XI, the judiciary assumed an independent organization, somewhat similar to the English Inns of Court. Before the middle of the fourteenth century, the judges were, to some extent, independent, *de jure* as well as *de facto*, and early in the fifteenth century the King did not disdain to appear before the Court, as plaintiff or defendant.

The Courts finally became organized into a High Court of Appeals, two lower Courts of first instance, and a Court having criminal jurisdiction, and it became geographically divided into "Parlements" of the different provinces of France.

The method of administration was that no law proclaimed by the legislature (which was rarely in session) or by the King, who had legislative as well as executive powers, could become a law until it was "registered." If the Courts refused to register the law, the King summoned a *lit de justice* and heard the objections of the judges. A deadlock then frequently ensued. If the King insisted upon the registration of the law, the Courts—meaning thereby both the Bench and the Bar—refused to administer the laws, and thus virtually boycotted the political branch of the Government. If the King was insistent, he could only compel acquiescence of the judiciary by using the Bastile as a court of last resort and consigning the judges to its tender mercies. The collisions between the two were not infrequent.

Thus, in the reign of Francis I, the King concluded The Concordat with the Pope and thus repealed the Pragmatic Sanction; and the judiciary refused for two years to register The Concordat.

Later, the same King published a law on poaching, and the Parlements refused to register it.

About 1590, Henry II attempted to legalize the Inquisition as a political institution, and again the judiciary refused to register it.

Richelieu, in the height of his power, never successfully crushed the power of the Courts.

Mazarin, his successor, at the very time when Cromwell was challenging the supremacy of the Stuarts, attempted to crush the Courts, and there resulted in France the war of the Frond. This was precipitated by the attempt of Mazarin to throw the leading judges into prison. Civil war developed. Paris became an armed camp. Mazarin prevailed, and the "Sun King," Louis XIV, showed his contempt of the judiciary by appearing before the Parlement de Paris booted and spurred, as for the chase, and with a riding whip in his hand, and demanded that the judges register some law which he proposed.

With the passing of the Sun King, the struggle was renewed. In 1753, the King (Louis XV), angered by the power of the Courts, suspended all their proceedings. By unanimous vote, the 158 judges wholly suspended the administration of justice. Thereupon the King imprisoned a number of the leading judges and exiled others; but, after a year of public inconvenience, the exiled judges were restored to power.

Simultaneously with the beginning of our own Revolution, the fight was renewed in France.

In 1771, the King issued a law to compel the peasants to work by conscription. The judiciary refused to register the law.

The crisis culminated in January, 1771, when the King's soldiers knocked at the door of each magistrate and required an immediate answer whether he would open his Court. A few said yes, but many said no. They were immediately banished and their offices confiscated. The King then organized a new Court, which became known as the Maupeou Parlement. This Court had a very short life, and went out of power in general contempt, due to the revelation of its subserviency and corruption in the famous case between Beaumarchais and Goezman.

France then returned to its former independent judiciary, and the fight was renewed. Louis XV promulgated two laws for a stamp and a land tax, and thus the culmination of the constitutional struggle in France, as a similar struggle in the Colonies, turned on the question of taxation. The King summoned the judges before him, and, under threats,

compelled them to register the laws. The judges returned to their Courts and adjudged that the registration was void, as under duress, and canceled it. The King ordered the arrest of some of the judges. The Courts then announced the principle that questions of taxations belonged to the people and demanded the convocation of the States General, the legislative body of France. They also proclaimed the irremovability of the judges and their immunity from arrest. The King at once issued warrants for the arrest of the two leading judges. Believing that they would have immunity, if actually on the Bench, the Court was hurriedly convened, and ordered a permanent session. For 36 hours, the Court remained in session, until the King's soldiers broke into the Palais de Justice and carried the whole Court into custody. The King thereupon organized a new Court, with plenary powers, and disturbances broke out in Paris and many of the provinces of France. To end the crisis, the Prime Minister summoned a meeting of the States General, which had not been in session for over 150 years, and when they met on the 5th of May, 1789—just two years after our own Constitutional Convention—the French Revolution virtually began.

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